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In The Supreme Court of the United States

October Term, 1986

SAMUEL P. TORRENCE, JR.

PETITIONER

VERSUS

OXFORD MUNICIPAL SCHOOL DISTRICT,
AND ITS BOARD OF TRUSTEES,
IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES,
GENE MEADOWS AND TERRY MOOD,
IN THEIR INDIVIDUAL AND OFFICIAL CAPACITY

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

When a plaintiff in a civil rights case presents a prima facie case of discriminatory termination based upon disparate treatment in comparison with his non-minority predecessor, to the extent that the employer imposes a different and more stringent standard of job performance upon the plaintiff than was imposed upon his white predecessor, how heavy should be the burden of proof required of the defendant to rebut the prima facie case and should that burden be a greater one than in the ordinary case?

II.

PARTIES TO THE PROCEEDING BELOW

Petitioner and Appellant in Torrence v. Oxford Municipal School District, No. 85-4600 in the United States Court of Appeals, Fifth Circuit, was Samuel P. Torrence, Jr.

Respondents and Appellees were the Oxford Municipal School District and its Board of Trustees, in their individual and official capacities, Gene Meadows and Terry Mood, in their individual and official capacity.

The individuals comprising the Board of Trustees are as follows: Leonard Thompson, President, Dorothy Henderson, Rebecca Moreton, W. N. Lovelady, and Ronald Borne, members.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

SAMUEL P. TORRENCE, JR.
PETITIONER

VS.

OXFORD MUNICIPAL SCHOOL DISTRICT, AND ITS BOARD OF TRUSTEES, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES, GENE MEADOWS AND TERRY MOOD, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITY
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OPINION BELOW

The United States Court of Appeals, on July 2, 1986, affirmed the August 1, 1985, Judgment of the United States District Court for the Northern District of Mississippi. See Appendix B for the Memorandum Decision of the District

Court, Appendix A for the Judgment of the District Court and Appendix C for the opinion of the Court of Appeals.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U. S. C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U. S. C. §1981

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

42 U. S. C. §1983

> Employers. It shall be an unlawful employment practice for an employer--
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin....

42 U. S. C. §2000e-2

STATEMENT OF THE CASE

The petitioner, Samuel P. Torrence, was first employed by the Oxford Municipal School District in September 1961 as band director of Oxford Training School, which at that time was an all-negro school. He initiated the band program at the school and remained as bend director until 1969, when the Oxford schools were integrated by court order, at which time Torrence was made band director at Oxford Jr. High.

In 1976 Torrence was unwillingly transferred to the Senior High Band, and made assistant band director under one Robert Work. Work, formerly a distinguished musician, was approaching

retirement, and the band program under his direction had been doing poorly for approximately five years preceding Torrence's appointment as assistant high school assistant band director, to the extent that one year the band did not even go to a band contest. Torrence was placed into the assistant band director position in an attempt to "breathe new life" into the band program.

Work retired in 1979 and Torrence became the high school band director. He was not given an assistant, and after only a few months in the position, Torrence was notified that his contract would not be renewed for the following year. After a hearing before an officer appointed by the Board, who found that problems had existed with the high school band for some five or six years prior to

Torrence's appointment, Torrence's employment was renewed. The hearing officer specifically found that Torrence did not have the support he needed and made a number of specific recommendations. The recommendations included the following:

1. A clearly defined job description should be developed for the position of high school band director. This description should be formulated with school officials, the band director and experts in the field of music.
2. Evaluative procedure should be written and understood by all parties.
3. If financially feasible, an assistant band director should be employed, with clearly defined duties.
4. If the band is an integral part of the school program, it should be supported financially.
5. An extensive band public relations program should be initiated and supported by all school personnel.

The recommendation of Blackston concluded with the following paragraph:

> I do not know if Samuel Torrence can succeed as band director at Oxford High School. He should be given the opportunity, as suggested above. If, given the proper opportunity, he cannot succeed, then his services should be terminated

As stated above, Torrence's contract was renewed for the year 1980-81, during which time most of the recommendations, including providing an assistant band director were not followed. Torrence was reappointed for the year 1981-82, and was given as assistant band director one Becky Snavley, one of a group of "concerned parents" who had some two years before signed a letter to the school administration voicing concern over the band program under Mr. Torrence, and precipitating the aforementioned

notification of termination for the year 1980-81, which termination was rescinded by the board. Mrs. Snavley was also the wife of Dr. Luther Snavely, University of Mississippi Band Director, who later testified against Mr. Torrence. The administration also made other halfhearted attempts to fulfill the recommendations of the hearing officer.

In the spring of 1982, the school administration again recommended that Torrence not be reemployed, citing as reasons the following:

> 1. The high dropout rates from one year to another, especially from the junior high school to the high school of children playing band instruments.
> 2. The performance of State band contests remained far below normal to an embarrassing degree.
> 3. The declining band program reached the attention of the Oxford Press.
> 4. Disorganization in planning, direction, teaching,

grading and classroom work.

5. Lack of consistent and effectual discipline.

6. Failure to create and maintain good rapport and communication with students, parents, facility and community.

7. Lack of cooperation with facility and administration.

8. No substantial improvement in the band program after three years is evident and no underlying factors exist that might form a firm basis for expected improvement to make the Oxford band program competitive with surrounding bands in north Mississippi.

The District Court held that although Torrence had made out a prima facie case of discrimination, the defendants had presented valid reasons for Torrence's termination which Torrence had not successfully rebutted by introducing further evidence that such reasons were either false or a sham. The Court of Appeals affirmed, holding that while the comparison between the treatment accorded Work and that accorded

Torrence might support an inference of discrimination, it was insufficient to undermine the thorough findings of fact marshalled to support the district court's decision. "We cannot say that the findings are not supported by the evidence or are internally inconsistent." In addition, the Court of Appeals refused to consider the cross-appeal of the respondents as to whether Torrence had made a prima facie case, since it could have no effects upon the outcome of the litigation.

REASONS FOR GRANTING THE WRIT

In McDonnell Douglas Corporation v. Green, 411 U. S. 792 (1973) this Court established the evidentiary procedure under Title VII of the 1964 Civil Rights Act that the complainant must carry the initial burden of establishing a prima facie case of racial discrimination. The burden then shifts to the employer to articulate some legitimate, non-discriminatory reason for the employee's rejection. 411 U. S. at 802. Should the defendant carry this burden, then the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not the true reasons, but were a pretext for

discrimination. Id. at 804.

This is a case involving the changing of performance criteria at the time a minority member replaces a retiring white employee and holding the minority employee to a far stricter standard than his predecessor. Thus, the discrimination does not consist necessarily of the treatment of the minority employee different from those non-minority employees similarly situated, as is usually the case, but a change in treatment at the time the minority employee succeeded the non-minority one. Thus, the minority employee can be given a semblance of due process, including hearings, ect., but the fundamental unfairness of having changed the basic rules of the game remains. Such discrimination is

particularly difficult to prove, since an upgrading of standards is usually regarded as a salutary action.

There is good reason, therefore, once a prima facie case is established of discriminatory treatment in comparison with a former employee in the same position, the defendant should be assigned a heavier burden of proof necessary to overcome the presumption under McDonnell Douglas Corporation, supra.

THE EVIDENTIARY PROCEDURE SET OUT IN MCDONALD DOUGLAS CORPORATION VS. PERCY GREEN IS INADEQUATE GIVEN THE FACTS OF THIS CASE

McDonald Douglas Corporation vs. Green, 411 U.S. 792 (1973) articulated a three-stage evidentiary procedure in Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 1983. The complainant must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. The burden must shift to the employer to articulate some legitimate, non-discriminatory reason for the employee's rejection, after which the plaintiff must be afforded a fair opportunity to show that the employer's stated reason for his termination was in fact pretext. Especially relevant to such showing would be evidence that white employees

involved in similar acts were nevertheless retained. The central focus of the inquiry in such a case as this is whether the employer has treated some people less favorably than others because of their race, color, religion, sex or national origin, and the method suggested in McDonald Douglas for pursuing this inquiry was never intended by this Court to be a rigid, mechanized or ritualistic.

Rather, it is merely a sensible and orderly way to evaluate the evidence in life of common experience as it bears on the critical question of discrimination. Furnco Construction Company vs. Waters, 438 U.S. 567, 577 (1978). Furnco further held that a McDonald Douglas prima facie showing is not the equivalent of a factual finding of discrimination, but simply proof of actions taken by the

employer from which we infer discriminatory animus because experiences prove that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations. 438 U. S. at 579, 580.

Texas Department of Community Affairs vs. Burdine, 450 U. S. 248 (1981), held that

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason. The defendant need not persuade the Court that it was actually motivated by the proffered reasons. See Sweeney, [Board of Trustees of Keene State College vs. Sweeney, 439 U.S. 24 (1978)], supra, at 25, 58 L.Ed. 2d 216, 99 S. Ct. 295. It is sufficient if the defendant's evidence raises a

> genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. 450 U.S. at 224, 225.

Once the presumption is rebutted the plaintiff retains the burden and must now have the opportunity to demonstrate that the proper reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the Court that the plaintiff has been the victim of intentional discrimination.

Burdine further stated that the defendant was only required to articulate, not prove a legitimate non-discriminatory reason for its action. In short, "the employer need only produce admissible evidence which would allow the trier a fact rationally to conclude that the employment decision has not been motivated by discriminatory animus." 450 U.S. at 257. The Court however, rejected the proposition that the defendant would be required to introduce evidence which in the absence of any evidence of pretext would persuade the trier fact that the employment action was lawful, and to do so would exceed what properly could be demanded to satisfy a burden of production.

Finally, in a recent case, U. S. Postal Service Board of Governors vs.

Aikens, 460 U. S. 711 (1983) a black employee of the Postal Service applied for a promotion for which he possessed the minimum qualifications and the employer selected a non-minority applicant. The District Court, after a bench trial, entered judgment in favor of the Postal Service which the Court of Appeals reversed. This Court vacated the Court of Appeals judgment and remanded for consideration in light of Burdine, supra. On remand, the Court of Appeals reaffirmed its earlier holding that the District Court had erred in requiring Aikens to offer direct proof of discriminatory intent. The case was fully tried on the merits. This Court held that once the defendant failed to persuade the District Court to dismiss the action for lack of a prima facie case

and responded to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, then the McDonald-Burdine presumption drops from the case and the factual inquiry proceeds to a new level of specificity. The District Court was then in a position to decide the ultimate actual factual issue in the case, which, in a Title VII case is whether the defendant intentionally discriminated against the plaintiff.

The Court concluded that in spite of the peculiar nature of civil rights cases that nevertheless trial courts or viewing courts should treat discrimination the same as other ultimate questions of fact. 460 U.S. at 716.

It can be inferred from a survey of the foregoing cases that the intent of this Court is that civil right cases be

treated pretty much as other cases of civil litigation. The presumption created by McDonald Douglas, supra, is not onerous, Burdine, supra, at 254, but also the results of the decisions of this Court have held, in effect, that the burden upon the defendant of overcoming this presumption is not particularly onerous, since it need not only articulate, not prove, a legitimate non-discriminatory reason for the actions. Burdine at 258.

Thus, the cases in which a defendant would be held liable to the plaintiff on the basis of only an unrebutted prima facie case will be few indeed. Experience bears out this conclusion. The case at bar clearly demonstrates the inadequacy of such a relatively neutral process in the case of an individual

minority member who is not necessarily discriminated against in comparison with non-minority fellow workers, but is held to a higher standard of performance than his non-minority predecessor.

The record of the trial will show that Torrence's predecessor as band director, one Robert Work, had been employed by the respondent since the early 60's, and that his performance in directing the Oxford High School Band was unsatisfactory for a period of at least five years preceding Torrence's employment as band director. Torrence himself, who holds a master's degree, had been employed almost as long as Work, first as band director in the all-black school system and then as band director in the integrated junior high school.

The evidence will further show that

he was transferred to the senior high school to be Work's assistant band director in order to breathe new life into the program. Work was retained as band director until he became ready for retirement, at which time Torrence was promoted to band director.

There is no objective or documentary evidence in the record that Torrence's performance was other than exemplary until he was made band director in the senior high school. All the trouble started when Torrence succeeded Work. Within several months of his appointment as band director for the high school, the school administration notified him that his contract would not be renewed for the following year. After a hearing before a hearing officer, he was retained for another two years, but the

recommendations of the hearing officer were either carried out belatedly or in such a way to negate their benefit. For instance, the hearing officer recommended that Torrence be given an assistant band director. This was not done until his last year, at which time, a woman was appointed as Torrence's assistant, who, while having worked with school bands in the distant past, had no experience with a band for many years, and who further had signed a letter to the school administration shortly after Torrence's original appointment as band director, expressing concern with the quality of the band program. Her husband, director of the University of Mississippi Band, testified against Torrence.

In short, the administration carried out just enough of the

recommendations of the hearing officer to justified Torrence's termination in an EEOC action or a suit in federal court.

Torrence was replaced by another black, Badrae Hannah, who remained as band director only one year. There is no question that the performance of the band improved under Hannah as Torrence predicted. The performance of the band under Hannah, is not totally relevant, however, since Torrence had filed his EEOC complaint, and it may be safely assumed that Hannah received the full support of the administration, something that Torrence never received.

The foregoing facts illustrate the difficulty of the McDonald Douglas-Burdine evidentiary scheme. First, since there was only one high school band director, it is an impossible

task to compare his treatment with the treatment of non-minority members similarly situated. If we compare the treatment of the other band directors in the system, the comparison is useless because their tasks were considerably different. Therefore, the only reasonable non-minority person similarly situated was Torrence's predecessor, and the comparison in that respect is striking. Both persons had been employees of the Oxford School District many, many years. The former was permitted to preside over an admittedly unsatisfactory band program until his retirement, whereas the other was the subject of intense administrative scrutiny combined with what was apparently considerable antipathy in the white community.

The problem of showing discrimination in a case such as this, however, is far more difficult than in the usual case of comparing a worker treatment with a non-minority worker who is employed at the same time under the same conditions. The ground rules can be subtly changed with the advent of the minority employee in such a way as to make his retention of employment far more difficult than that of his predecessor and such a change in ground rules can often be justified as a "upgrading" of standards. An upgrading of standards is always considered to be a good thing, but such a coincidence as in the case at bar ought to raise a far stronger presumption of unlawful discrimination than in the usual case, simply because of the extreme difficulty of a plaintiff with a

meritorious case being able to prove his case on the merits, usually in the face of an administration which carefully planned his ouster over a period of several years, which is the case here.

Discrimination of this kind is all too common. Employers have learned to rid themselves of a minority employee without resorting to the obvious and blatant methods employed in the sixties and early seventies. It can be done rather safely today by a moderate increase in responsibility and a slight decrease in the authority and means given the employee for the carrying out of that responsibility. This is precisely what has happened in the case at bar.

Thus the need for an exception in the McDonald Douglas-Burdine evidentiary rule should be made in a case like the

one here. Once the minority employee has made a prima facie case of discrimination in comparison with his predecessor, the employer, in order to rebut the presumption of discrimination ought to be required to make a "clear and convincing case" that the change in treatment was motivated by reasons other than race.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

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Attorney for Petitioner

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(601) 969-2248

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I, the undersigned counsel for Petitioner certify that true and correct copies of the above and foregoing Petition for Write of Certiorari to the United States Court of Appeals for the Fifth Circuit have this day been mailed by United States mail, postage prepaid, to the following:

Hon. Will A. Hickman
Hon. S. T. Rayburn
Hon. Lawrence L. Little
SUMMERS, HICKMAN & RAYBURN
P. O. Box 430
Oxford, Mississippi 38655

It is further certified that all parties required to be served have been served.

This, the 29th day of September, 1986.

THOMAS J. LOWE, JR.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

SAMUEL P. TORRENCE, JR.,

Plaintiff,
v.
CIVIL ACTION
OXFORD MUNICIPAL SCHOOL
DISTRICT, NO. WC 83-6-WK-D
and its BOARD OF TRUSTEES, in
their
individual and official
capacities,
GENE MEADOWS, in his individual
and
official capacity, and TERRY
MOOD,
in his individual and official
capacity,

Defendants.

JUDGMENT

Upon the call of the case, the court conducted an evidentiary hearing, and after hearing argument, it made findings of fact and conclusions of law incorporated in Memorandum of Decision of this date, it is

ORDERED:

1. That plaintiff, Samuel P. Torrence, Jr., have of and recover nothing from defendants, Oxford Municipal School District and its Board of Trustees, Gene Meadows, Superintendent of Oxford School District, and Terry Mood, Oxford High School Principal.

2. That the complaint is hereby DISMISSED with prejudice with costs to be taxed.

3. That the motion of defendants for an award of attorney's fees pursuant to 42 U.S.C. § 1988 is hereby DENIED.

This 1st day of August, 1985.

William C. Keady

United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

SAMUEL P. TORRENCE, JR.,
Plaintiff,

v.
CIVIL ACTION
OXFORD MUNICIPAL SCHOOL
DISTRICT, NO. WC
83-6-WK-D
and its BOARD OF TRUSTEES, in
their
individual and official
capacities,
GENE MEADOWS, in his individual
and
official capacity, and TERRY
MOOD,
in his individual and official
capacity,
Defendants.

MEMORANDUM OF DECISION

On January 12, 1983, plaintiff, Samuel P. Torrence, Jr., a black, sued Oxford Municipal School District and its Board of Trustees, Gene Meadows, Superintendent of Oxford School District, and Terry Mood, Oxford High School principal, defendants, (Footnote 1) to

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1. All individual defendants are sued both in their individual and official capacities.

redress claims of racial discrimination in employment practices. Federal jurisdiction was founded on 28 U.S.C. §§ 1331, 1343(4) for causes of action arising under Title VII, 42 U.S.C. §2000E-5F(3), and 42 U.S.C. §§ 1981 AND 1983. Plaintiff sought back pay, punitive damages, reinstatement, and attorney's fees and costs. Defendants denied the allegations of the complaint and, in turn, moved for an award of attorney's fees against plaintiff for defending the action.

After discovery and pretrial conference, the parties entered into a stipulation of facts contained in a pretrial order dated October 17, 1983. The Court conducted an evidentiary hearing on July 29 and 30, 1985, at which time the parties appeared personally and

by their attorneys, offered oral and lengthy documentary evidence, and the court heard oral argument of counsel. Being duly advised in the premises, the court now makes findings of fact and conclusions of law pursuant to Rule 52(a), Fed. R. Civ. P., as follows:

I. Findings of Fact

1. Plaintiff, the holder of bachelor's and master's degrees in music education, was first hired in 1961 by the defendant board as band and music director of the all-black Central High School. With the advent of desegregation in 1970 of the Oxford public schools, plaintiff in the years following held the positions of assistant band director, and band director of Oxford Junior High School. In 1976, he was assigned as the

assistant band director of Oxford High School. In the fall of 1979, plaintiff was appointed high school band director on the recommendation of Superintendent Gene Meadows, but he was not recommended for re-employment at the end of the 1979-80 school year. This action was the result of recommendations by Superintendent Meadows and Terry Mood, the Oxford High School principal.

2. In January 1980, dissatisfaction with the high school band surfaced when a number of parents petitioned the school board expressing concern about the reduced numbers of junior high school students entering the high school band, the low ratings given the band at state contests, and the apparent lack of enthusiasm and pride of students in being band members. The patrons called upon

the school board to take appropriate steps to assure that the band program was of proper quality. (Footnote 2) In April 1980, pursuant to plaintiff's request, hearings were held before Joseph Blackston, University of Mississippi professor named by the school board to take evidence and make recommendations regarding plaintiff's further employment as high school band director. On July 3, 1980, Blackston rendered a report (P. Exh. 5), summarizing the problems facing the high school band, the past conflicts, weaknesses, and experience during the years that plaintiff had served as band director. Blackston made specific

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2. The signers of the petition were parents of white high school students, including Mrs. Snavely, the wife of Luther Snavely, University of Mississippi band director, who later testified against plaintiff in the 1980 hearing before Professor Blackston.

recommendations as follows:

1. A clearly defined job description for the position should be formulated by school officials, the band director and experts in the music field.
2. Written evaluative procedures should be established and adhered to.
3. An assistant band director should be employed with clearly defined duties.
4. Adequate financial budget should be provided.
5. A public relations program should be supported by all school personnel.

Blackston concluded his recommendations by stating "I do not know if Samuel Torrence can succeed as band director at Oxford High School. He should be given the opportunity, as suggested above. If, given the proper

opportunity, and he cannot succeed, then his services should be terminated."

3. On July 8, 1980, the board, acting on Blackston's recommendations, employed plaintiff as high school band director for 1980-81. During the next two years, plaintiff served as high school band director, each year receiving the recommendation for re-employment by Superintendent Meadows and Principal Mood. All of Blackston's recommendations, however, were not immediately carried out. The job description and written evaluative procedures were promptly established. Although seven applicants were interviewed, school officials were unable to employ an assistant high school band director until the fall of 1981, when Mrs. Rebecca Snavely was employed.

Plaintiff objected to her appointment, even though she was qualified for the post, and recommended Ken Lewis, who was approached by the administration but was unavailable. There was also a delay in obtaining new band uniforms. In due course, the band's budget was increased and a public relations program was placed in effect by school personnel.

4. Despite these steps to improve the band program, problems developed from disorganization in planning the program, training and teaching band students. Further, there was a lack of proper discipline and a failure of communication between the band director, the students and parents as well as other school personnel. The statistical record for the three-year period showed student participation in the high school band

progressively declining, with extraordinary dropout rates of 73% ind 1979-80, 80% in 1980-81, and 86% in 1981-82. According to credible testimony, the dropout rate should not exceed 20%, or at the most, 30%. During each of the years that the Oxford High School band, classed as a BB band, attended state contests, it performed unsatisfactorily. For example, in 1979-80, it scored, on a scale of I to IV, with I being superior and IV fair, a III in concert, III in sight reading, and III in marching. In 1980-81, the band scored IV in concert, III in sight reading, and IV in marching. In 1981-82, the scoring was the lowest grade of IV in each of the three categories. At the same time, individual members performing solo or ensemble work were rated either

superior or excellent.

5. On April 1, 1982, Principal Mood advised Superintendent Meadows of his decision not to recommend plaintiff for continued employment, stating that he had observed plaintiff's performance during the past three years and that his continued employment would not be in the best interest of the band program or the school as a whole. On April 6, 1982, Superintendent Meadows advised the plaintiff that he would not be re-employed for the 1982-83 school year and stated that plaintiff, upon his request, was entitled to a hearing before the school board. Plaintiff engaged an attorney who requested a hearing and a list of the reasons for the non-renewal of plaintiff's employment. This information was provided. On May 6,

1982, the school board conducted a hearing at which testimony was given by plaintiff and witnesses in his behalf and by Mood and Meadows. After full hearing, a transcript of which has been received into evidence in this court, the school board upheld the non-renewal of plaintiff's contract. On June 4, 1982, he was notified of this decision which was based upon the following reasons:

> 1. Having been band director for three years this band program under your direction is progressively declining each year in interest, student participation and quality of performance;
> 2. Disorganization in planning, direction, teaching, grading and classroom work;
> 3. Lack of consistent and effectual discipline;
> 4. Failure to create and maintain good rapport and communication with students, parents, faculty and community;
> 5. Lack of cooperation with faculty and administration; and

> 6. No substantial improvement in the band program after three years is evident and no underlying factors exist that might form a firm basis for expected improvement to make the Oxford band program competitive with surrounding bands in Mississippi.
> P. Exh. 11.

6. On June 14, 1982, plaintiff filed a charge of racial discrimination with the Equal Employment Opportunity Commission (EEOC) stating that the Oxford school system had discriminated against him because of race and also because he had filed a previous EEOC charge in 1976, upon his failure to be promoted at that time to the position of high school band director. Although plaintiff subsequently withdrew the 1976 charge, he felt that continued harassment had resulted because of the previous filing and "has finally culminated in my

discharge." (P. Exh. 1). On October 26, 1982, EEOC determined there was no reasonable cause to believe plaintiff's allegations were true and dismissed the charge. On the same date, notice of the right to sue was issued to plaintiff. The present action followed.

7. Upon the recommendation of Mood and Meadows, the school board employed Badrae Hannah, a black, as high school band director for the 1982-83 school year. Hannah, who had been employed at d'Iberville High School, was highly qualified for the position; under his directorship the Oxford High School band showed marked improvement at the state band contest, scoring II in concert, I in sight reading, and II in marching. During the three years that plaintiff was band director, Oxford High School had an

enrollment of more than 550 students, 35% of whom were black. Blacks composed 28% of the high school faculty and staff. For the district as ao whole, black enrollment was 40% and black faculty and staff was 28%.

At trial, plaintiff testified that his employment was not renewed partly because of the band's deficiencies in marching and the low ratings received at the state contests. Also, he felt that he was discriminated against on account of race, a feeling based upon objections made by parents of white high school students. Plaintiff acknowledged that there had been a decline in student participation in the band during the three years of his directorship but attributed the decline to factors beyond his control, such as scheduling problems,

community unrest, unjustified criticism, and lack of communication between him, the students and the community. Plaintiff's witnesses, William McCune and Debra Gibson, who had been members of the Oxford Junior High School band when plaintiff served as the director, were supportive of plaintiff's efforts and regarded him as an effective director and a positive influence for student development. In opposition to this testimony, Mood and Meadows, both in this court and at the 1982 school board hearing, testified that plaintiff's contract was not renewed because of his unsatisfactory performance. They detailed a multitude of problems which plaintiff encountered in organizing the band program and his failure to coordinate individual efforts into an

effective group. Further, they stated that he was inconsistent in dealing with students in discipline and grading practices and that under plaintiff's directorship the band performance had steadily declined, reaching the lowest possible rating in all contest categories. Mood testified that he was confronted with a constant flow of students wanting to drop out of the band and that he spent a great deal of time in encouraging them to stay in the program. During many conferences with plaintiff about the problems in the band department, Mood found him to be hostile to suggestions. The principal documented many instances of chaotic conditions when the band marched in public and found that plaintiff had poor rapport with his students, often directing them to do

things without explanation. Also, plaintiff's failure to maintain correct discipline in the bandroom was most unsatisfactory. Principal Mood stated that he had recommended Torrence in prior years since it had been determined that he should have three years to establish a good band program, but that plaintiff's performance had not improved. Superintendent Meadows testified that the primary reason for the non-renewal was the steady decline in student participation and performance of the band. Secondly, he attributed the non-renewal to a decline in band ratings at state contests where the comments of adjudicators showed that there was no improvement from one year to the next. A third reason was the unfortunate disorganization in plaintiff's planning

of an instructional program and his inconsistent grading and teaching. A fourth reason was excessive disciplinary problems that plaintiff had with students. Finally, Meadows was of the opinion that the cause of many complaints he received from parents about lack of planning and coordination in the band program was that plaintiff had no rapport with the community. Meadows agreed with Mood in stating that they had seen no indication of improvement in the band program during the three years that plaintiff had been the band director and that since there had been a steady decline in student participation and band performance, plaintiff's contract should not be renewed. Both specifically denied that their recommendation was racially motivated. Meadows stated further that

he frequently counseled with plaintiff about the band problems and gave suggestions on ways in which the administration might assist. These counseling sessions were held when plaintiff was first employed as high school band director and they continued each year. The superintendent stated that he was unable to communicate with plaintiff, who was more interested in justifying his actions than in seeking solutions for an improved band program.

8. The court finds as a fact that the non-renewal of plaintiff's contract in April 1982 was, in fact, based upon plaintiff's unsatisfactory performance as band director and that the reasons proffered by the school board in its June 4, 1982, decision are supported by substantial evidence. The court further

finds that plaintiff abandoned any claim that the school officials retaliated against him because of his previous filing of an EEOC charge since he gave no testimony to that effect either at the board hearing or in this court. In any event, there is no factual basis for a claim of retaliatory conduct. The court further finds as a fact that the recommendation of Mood and Meadows not to hire the plaintiff and the school board's decision upholding such recommendation was not in any way racially motivated.

9. Although the court was impressed with plaintiff's dedication to music and the earnestness of his manner at trial, nonetheless his inability to develop a high school band that could effectively function, after having three years to achieve such a result, justified the

school board in discontinuing his further employment. It is not for this court to say that plaintiff should have been given more time to reach the objective that he and the defendants desired. Suffice it to say that the non-renewal was not actuated by racial considerations and was within the discretion of school officials which this court is bound to respect.

II. Conclusions of Law

1. In a disparate treatment case involving a discharge situation, a Title VII plaintiff carries the initial burden of establishing a prima facie case of discrimination. See Texas Department of Community Affairs v. Burdine , 450 U.S. 248, 252-53 (1981). Generally, the plaintiff must show that "(1) he belongs to a group protected by the statute; (2)

he was qualified for the job from which he was suspended and not rehired; (3) he was terminated; and (4) after his termination, the employer hired a person not in plaintiff's protected class, or retained those, having comparable or lesser qualifications, not in plaintiff's protected class." Whiting v. Jackson State University , 616 F.2d 116, 120-21 (5th Cir.), reh'q denied , 622 F.2d 1043 (1980). However, this four-part test is not the exclusive method by which a plaintiff may make prima facie proof of discriminatory discharge. Byrd v. Roadway Express , 687 F.2d 85, 86 (5th Cir.), reh'q denied , 691 F.2d 502 (1982). The basic inquiry is whether or not one can infer from the employer's actions, if unexplained, that those actions were based, more likely than not,

on illegal discriminatory factors. Furnco Construction Co. v. Walters , 438 U.S. 567; 576 (1978) (quoting Teamsters v. United States , 431 U.S. 324,358 (1977).

Once a plaintiff has established a prima facie case, the defendant must attempt rebuttal by clearly articulating a legitimate, nondiscriminatory reason for the employment decision. Sanchez v. Texas Commission on Alcoholism , 660 F.2d 658, 660 (5th Cir. 1981). A defendant does not bear the burden of persuading the court that he was actually motivated by the proffered reasons; rather, an employer need only raise a genuine issue of fact as to whether there was illegal discrimination involved in plaintiff's discharge. If an employer satisfies its burden of production, the burden again

shifts to the plaintiff to prove that the proffered reasons are not merely pretextual. Id . at 660-61.

When Title VII and 42 U.S.C. § 1983 are used as parallel remedies in a disparate treatment suit, the same substantive elements are applicable for recovery under both statutes. Nilsen v. City of Moss Point , 701 F.2d 556, 559 n.3 (5th Cir. 1983). The same principles also apply when Title VII disparate treatment claims are brought in conjunction with claims under 42 U.S.C. §1981. Adams v. McDougal , 695 F.2d 104, 109 (5th Cir. 1983).

2. In the instant suit, we conclude that plaintiff did present a prima facie case of disparate treatment as defined under Title VII. However, upon defendants' articulation of

legitimate, nondiscriminatory reasons for non-renewal of Torrence's contract, the presumption raised by the prima facie case disappeared. The court holds that plaintiff did not carry his burden of demonstrating that those reasons were a mere pretext, either by casting doubt on their truth or by proving that a discriminatory purpose more likely motivated defendants' decision. Substantial evidence supports the finding that plaintiff's non-renewal was because of his unsatisfactory performance. Therefore, plaintiff is not entitled to recovery under Title VII.

3. Upon plaintiff's failure to prove pretext under Title VII, we must also conclude that no recovery is available under 42 U.S.C. §§ 1981 and 1983.

4. Defendants moved, in the event that judgment was granted in their favor, that plaintiff be required to pay their attorneys' fees and expenses pursuant to 42 U.S.C. § 1988. The motion is not well taken and is denied. Mr. Torrence's suit was not frivolously brought. To the contrary, it was brought in good faith, and plaintiff was able to make a prima facie case pursuant to Title VII and 42 U.S.C. §§ 1981 and 1983. See E.E.O.C. v. Christianburg Garment Co., Inc. , 550 F.2d 949,m 951-52 (5th Cir. 1977).

Let an order issue accordingly.

This 1st day of August, 1985.

William C. Keady

United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-4600
Summary Calendar

SAMUEL P. TORRENCE, JR.,

Plaintiff-Appellant,

Cross-Appellee,

versus

OXFORD MUNICIPAL SCHOOL
DISTRICT, ET AL.,
Defendants-Appellants,

Cross-Appellants.

Appeals from the United States District
Court
for the Northern District of Mississippi

Before POLITZ, GARWOOD, and
JOLLY, Circuit Judges.
PER CURIAM:*

Samuel P. Torrence, Jr. appeals a judgment of the district court, after a bench trial, dismissing his claims under

Title VII, 42 U.S.C. §§ 2000e et seq. , and 42 U.S.C. §§ 1981 & 1983. The defendants, Oxford Municipal School District (OMSD), its superintendent, and the principal of Oxford High School, cross-appeal from the finding that Torrence established a prima facie case of racial discrimination. We affirm.

Background

Torrence, a black male, was initially hired by OMSD in 1961 as band and music director at Oxford Training School, a secondary school in Oxford, Mississippi. When the Oxford public schools were integrated in 1970, Torrence became assistant band director at Oxford Junior High School and later succeeded to the directorship. In 1976 Torrence was named assistant to band director Robert Work at Oxford High School. When Work

retired in 1979, Torrence was named to replace him.

During the course of Torrence's first year as band director, a number of parents petitioned the school to express their concern over the reduced numbers of junior high school students entering the high school band, the low ratings given the band at state contests, and the apparent lack of enthusiasm and pride among students in being band members. These parents, all of whom were white, called upon the school board to improve the quality of the band program. The school board appointed a special hearing officer to determine whether Torrence should be continued in his position as band director. The hearing officer found several deficiencies in the band program and made certain specific recommendations

to improve the program. The hearing officer concluded by finding: "I do not know if Samuel Torrence can succeed as band director at Oxford High School. He should be given the opportunity. . . . If, given the proper opportunity, and he cannot succeed, then his service should be terminated." Pursuant to this recommendation, Torrence was continued as band director for the 1980-81 academic years.

During these two years, the band continued to suffer from a lack of morale, evidenced by an extremely high dropout rate. The band's performance at state competitions continued to be poor. Although the recommendations of the hearing officer to improve the band and enhance the position of the band director were not all immediately effectuated,

most were phased-in during Torrence's second and third years as band director.

In April 1982 Torrence was advised that he would not be rehired for the 1982-83 academic year. He retained an attorney and requested and received an evidentiary hearing before the school board. The school board voted to uphold the nonrenewal of Torrence's contract, assigning six reasons:

> 1. Having been band director for three years the band program under your direction is progressively declining each year in interest, student participation and quality of performance;
> 2. Disorganization in planning, direction, teaching, grading and classroom work;
> 3. Lack of consistent and effectual discipline;
> 4. Failure to create and maintain good rapport and communication with students, parents, faculty and community;
> 5. Lack of cooperation with faculty and administration; and

6. No substantial improvement in the band program after three years is evident and no underlying factors exist that might form a firm basis for expected improvement to make the Oxford band program competitive with surrounding bands in Mississippi.

Torrence filed a charge, alleging racial discrimination and retaliatory discharge, with the Equal Employment Opportunity Commission, which dismissed the charge and issued a right-to-sue letter. The instant suit was then filed. At conclusion of the evidence, the district court employed the test of Texas Department of Community Affairs v. Burdine , 450 U.S. 248 (1981), found that Torrence had established a prima facie case of racial discrimination, that OMSD had advanced legitimate, nondiscriminatory reasons for Torrence's dismissal, but that Torrence failed to

prove that these reasons were pretextual. Torrence appeals the denial of his claim. The defendants appeal the finding that Torrence established a prima facie case.

Analysis

Initially, we order Torrence's appeal reinstated since it was improvidently dismissed. After changing attorneys, Torrence was granted an extension of time within which to file his brief. The brief was mailed timely. The clerk inadvertently entered a standing order dismissing the appeal for want of prosecution. Under Fed.R.App.P. 25(a), we consider Torrence's brief filed as of the day of mailing. It was also timely received by our clerk. Fed.R.App.P. 26(c) allows an additional three days for

a mailed brief.

The fact-findings of the district court are insulated from review unless they are clearly erroneous, Pullman-Standard v. Swint, 456 U.S. 273 (1982), and may not be reversed unless, upon a review of the entire record, we are left with a "definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 385 (1948). See generally Anderson v. City of Bessemer City, 84 L.Ed.2d 518 (1985).

Torrence's principal complaint on appeal is that the district court clearly erred in finding that OMSD's proferred reasons for his dismissal were not pretextual. He focuses his argument on the disparate treatment he received from the defendants in comparison with the treatment accorded

Work, his white predecessor, who had also done a poor job during his last years as band director but was allowed to remain until he retired. Although the comparison between the treatment accorded Work and that accorded Torrence might support an inference of discrimination, it is insufficient to undermine the thorough findings of fact marshalled to support the district court's decision. Where questions of motive and intent become critical, the trier of fact is in a much better position than a reviewing court to make the necessary determinations. Inherent therein are credibility assessments. We cannot say that the findings are not supported by the evidence or are internally inconsistent. They must therefore be upheld. Anderson.

Because we find adequate evidence in the record on which to affirm the judgment, we do not consider the cross-appeal and decide whether the determination that Torrence had proven a *prima facie* case is clearly erroneous. The results of that review could have no effect on the outcome of the litigation.

AFFIRMED.

Supreme Court, U.S.
FILED
OCT 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-539

In The

Supreme Court of the United States

October Term, 1986

SAMUEL P. TORRENCE, JR.,

Petitioner,

vs.

OXFORD MUNICIPAL SCHOOL DISTRICT, AND ITS BOARD OF TRUSTEES, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES, GENE MEADOWS, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, AND TERRY MOOD, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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No. 86-539

In The

Supreme Court of the United States

October Term, 1986

SAMUEL P. TORRENCE, JR.,

Petitioner,

vs.

OXFORD MUNICIPAL SCHOOL DISTRICT, AND ITS BOARD OF TRUSTEES, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES, GENE MEADOWS, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, AND TERRY MOOD, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari.

CASE HISTORY

In the present action petitioner has alleged that respondents, the Oxford [Mississippi] Municipal School District, its former superintendent, and a former high

school principal, unlawfully terminated the petitioner from employment because of his race and in retaliation for a prior charge of discrimination filed with the Equal Employment Opportunity Commission. Federal jurisdiction is founded on 28 U.S.C. §§ 1331 and 1343(4) for causes of action arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(3), and 42 U.S.C. §§ 1981 and 1983. After discovery and a pretrial conference, the District Court conducted a full two-day evidentiary hearing. After its conclusion, the District Court found, as fact, that the non-renewal of the petitioner's teaching contract was not racially motivated but, instead, was based upon unsatisfactory work performance. The District Court further noted that "the reasons proffered by the school board . . . are supported by substantial evidence." Appendix B-19. Since no evidence or testimony was presented regarding the issue, the District Court found no basis for petitioner's claim of retaliation and concluded that the claim had been abandoned. Appendix B-19, 20; *see also* B-25. These findings of fact necessitated a ruling that, while petitioner had presented a prima facie case of disparate treatment under Title VII, respondents had articulated legitimate, non-discriminatory reasons for its employment decision and that the petitioner did not demonstrate that those reasons were a mere pretext to racial discrimination. Appendix B-25. The two parallel causes of action for racial discrimination were likewise dismissed. The United States Court of Appeals for the Fifth Circuit, in an unpublished *per curiam* opinion, affirmed the District Court decision. Appendix C.

To the extent petitioner has characterized facts unsupported by the current record, respondents would object. The facts relevant and essential to petitioner's appeal are adequately set forth in the two lower court opinions.

CERTIORARI SHOULD NOT BE GRANTED

Respondents have procedural and substantive arguments against granting certiorari.

Petitioner presents the following question for the Court's review:

> When a plaintiff in a civil rights case presents a prima facie case of discriminatory termination based upon disparate treatment in comparison with his non-minority predecessor, to the extent that the employer imposes a different and more stringent standard of job performance upon the plaintiff than was imposed upon his white predecessor, how heavy should be the burden of proof required of the defendant to rebut the prima facie case and should that burden be a greater one than in the ordinary case?

This question differs greatly from the issue[s] which petitioner raised and were considered by the Fifth Circuit Court of Appeals. Those issues, as outlined in petitioner's initial appellant brief, are as follows:

1. Whether the District Court erred in finding that the appellant, Samuel P. Torrence, Jr., was discharged from his employment with the Oxford Municipal School District because of his race. This issue encompasses three subissues [sic]:

    a. Whether the school administration deliberately engaged in a long term plan to put Mr. Torrence into a position where he could not possibly measure up to the standard required of him by the administration;

    b. Whether Mr. Torrence was treated differently from other band directors and employees

who achieved similar results, but were allowed to retain their employment;

c. Whether the school administration adequately supported Mr. Torrence after it voted to retain him based upon the recommendations of a hearing officer in 1980 which recommendations included such items as an assistant band director, new uniforms, etc.

Appendix D-2.

Since the issue presented for certiorari differs from those presented to the courts below, the District Court and the Fifth Circuit Court of Appeals have never addressed the issue petitioner currently advocates. Indeed, the Fifth Circuit viewed the questions petitioner raised at that level of appeal as follows: "[Petitioner's] principal complaint on appeal is that the district court clearly erred in finding that [respondents'] proffered reasons for his dismissal were not pretextual." Appendix C-8. Since petitioner failed to raise his present theory to the Circuit Court, certiorari should be denied on this basis alone.

Firmly established is the principle that this Court will not entertain questions by writ of certiorari not previously raised and considered by the reviewing Court of Appeals or a state's highest court. See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147, n. 2, 90 S.Ct. 1598, 1602, 26 L.Ed. 2d 142 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Youakim v. Miller*, 425 U.S. 231, 233-234, 96 S.Ct. 1399, 1401, 47 L.Ed. 2d 701 (1976) (citing cases); *Lawn v. United States*, 355 U.S. 339, 362, n. 16, 78 S.Ct. 311, 324, 2 L.Ed. 2d 321 (1958);

Duignan v. United States, 274 U.S. 195, 200, 47 S.Ct. 566, 568, 71 L.Ed. 996 (1927) (citing cases); *Montana Ry. Company v. Warren,* 137 U.S. 348, 351, 11 S.Ct. 96, 97, 34 L.Ed. 681 (1890); *Husty v. United States,* 282 U.S. 694, 701-02, 51 S.Ct. 240, 241, 75 L.Ed. 629 (1931); *Schlesinger v. Councilmen,* 420 U.S. 738, 743, 95 S.Ct. 1300, 1306, 43 L.Ed. 591 (1975); *Old Jordan Mining and Mill Company v. Societe Anonyme Des Mines De Lexington,* 164 U.S. 261, 17 S.Ct. 113, 114, 41 L.Ed. 427 (1896); *Cardinale v. Louisiana,* 394 U.S. 437, 438, 89 S.Ct. 1161, 1162, 22 L.Ed. 2d 398 (1969) (appeal from state court); *Tacon v. Arizona,* 410 U.S. 351, 352, 93 S.Ct. 998, 999, 35 L.Ed. 2d 346 (1973) (same). Only in exceptional cases arising from the federal courts will questions not pressed or passed upon below merit review. *Duignan v. United States,* 274 U.S., at 200, 47 S.Ct., at 568; *Lawn v. United States,* 355 U.S., at 362, n. 16, 78 S.Ct., at 324. As the Court stated in *Magruder v. Drury,* 235 U.S. 106, 35 S.Ct. 77, 79, 59 L.Ed. 151 (1914), alleged errors not of a fundamental or jurisdictional character and not presented to the appellate court for consideration are deemed waived either expressly or by implication.

The question petitioner seeks to be reviewed does not involve elements fundamental or jurisdictional in nature; nor is petitioner's question of such an exceptional nature as to warrant this Court's review. *Cf. Youakim v. Miller,* 425 U.S., at 234, 96 S.Ct., at 1401 (conflict between state and federal statutes). Had petitioner raised the issue below, specific findings consistent with the theory petitioner now advocates could have been obtained; and, depending on the outcome, this costly added litigation might have been avoided.

When searching for that "exceptional" case which, under these extraordinary circumstances, merits review,

the Court may use by comparison its own guidelines for deciding when to grant certiorari in the typical case. "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Rule 17, Revised Rules of the Supreme Court of the United States. The decision of the Court of Appeals does not:

(1) conflict with a decision of another court of appeals,

(2) conflict with a decision of this Court,

(3) depart from the accepted and usual course of judicial proceedings, or

(4) present an important question of federal law.

To the contrary, as noted below, the decision of the Court of Appeals is consistent with other courts of appeals, consistent with the prior decisions of this Court, and consistent with the usual course of judicial procedure. The underlying question petitioner has presented for review has been recently addressed, and re-affirmed, by this Court. Accordingly, even had petitioner's question been raised below, it would not warrant review.

Petitioner seeks to undermine the well-established evidentiary scheme used when addressing Title VII actions. Petitioner admits in his initial brief to the Fifth Circuit Court of Appeals that the law is "well established" in this area, Appendix D-3, and, in fact, relies on this procedure when arguing before that court. The procedure established by *McDonnell Douglas Corporation v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973), and the cases that follow, requires a plaintiff to carry the

initial burden of production and establish a prima facie case of racial discrimination. No single method exists by which a prima facie case must be presented. A prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed. 2d 957 (1978) (defining the elements of a prima facie case). Once accomplished, the employer must produce "evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason." *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed. 2d 207 (1981). At this point, the presumption of discrimination "drops from the case," *id.* at 255, n. 10, 101 S.Ct. at 1095, and the District Court proceeds to the ultimate question: whether the particular employment decision at issue was made based on impermissible grounds, such as race. *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 715, 103 S.Ct. 1478, 1481-82, 75 L.Ed. 2d 403 (1983). "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Dept. of Community Affairs v. Burdine,* 450 U.S., at 253, 101 S.Ct., at 1093; *see also Board of Trustees of Keene State College v. Sweeney,* 439 U.S. 24, 25, n. 2, 99 S.Ct. 295, 296, 58 L.Ed. 2d 216 (1978); *United States Postal Service Board of Governors v. Aikens,* 460 U.S., at 716, 103 S.Ct., at 1482.

Along with the cases previously cited, this Court has consistently followed the principles outlined above. See

also, *Cooper v. Federal Reserve Bank of Richmond,* 467 U.S. 867, 875, 104 S.Ct. 2794, 2799, 81 L.Ed. 2d 718 (1984); *McDonald v. Santa Fe Trail Transportation Company,* 427 U.S. 273, 281, 96 S.Ct. 2574, 2579, 49 L.Ed. 2d 493 (1976); *General Electric Company v. Gilbert,* 429 U.S. 125, 137, 97 S.Ct. 401, 408, 50 L.Ed. 2d 343 (1976); *N.L.R.B. v. Transportation Management Corp.,* 462 U.S. 393, 400, n. 5, 103 S.Ct. 2469, 2473, 76 L.Ed. 2d 667 (1983). The decision of the Court of Appeals is, therefore, not inconsistent with the decisions of this Court. Since the *Burdine* decision, each circuit court of appeals has specifically adopted this evidentiary scheme with marked consistency. See, e.g., *Mitchell v. Baldrige,* 759 F.2d 80, 84-85 (D.C. Cir., 1985); *Andrews v. Bechtel Power Corporation,* 780 F.2d 124, 141 (1st Cir. 1985); *Meiri v. Dacon,* 759 F.2d 989, 995 (2nd Cir. 1985); *Monroe v. Burlington Industries, Inc.,* 784 F.2d 568, 571 (4th Cir. 1986); *McDaniel v. Temple Independent School District,* 770 F.2d 1340, 1345 (5th Cir. 1985); *Selden Apartments v. U. S. Department of Housing and Urban Development,* 785 F.2d 152, 160-161 (6th Cir. 1986); *Dorsch v. L. B. Foster Company,* 782 F.2d 1421, 1424 (7th Cir. 1986); *Weber v. Block,* 784 F.2d 313, 315 (8th Cir. 1986); *Lowe v. City of Monrovia,* 775 F.2d 998, 1005 (9th Cir. 1985); *E.E.O.C. v. University of Oklahoma,* 774 F.2d 999, 1001 (10th Cir. 1985); *Barber v. International Brotherhood of Boilermakers,* 778 F.2d 750, 756 (11th Cir. 1985); *Stokes v. F.A.A.,* 761 F.2d 682, 684 (Fed. Cir. 1985). Accordingly, the Appeals Court decision is not inconsistent with that of another circuit. An examination of the decisions rendered by both the District Court, Appendix B, and Fifth Circuit Court of Ap-

peals, Appendix C, would reveal no departure from accepted and usual course of proceedings, but, rather, close adherence to the above cited criteria.

Substantively, petitioner has misconstrued this basic framework of the *McDonnell Douglas* divisions of intermediate evidentiary burdens and their purpose. He complains that, since he is unable to compare the treatment he received with that of a present employed non-minority counterpart and was allegedly held to higher standards of performance than non-minority personnel previously assigned the same position, respondents "should be assigned a heavier burden of proof necessary to overcome the presumption under *McDonnell Douglas.*" Petition, pp. 12-13; 27-29. Petitioner suggests that the burden be one of "clear and convincing evidence." Petition, p. 29. This argument may vaguely follow either one of two avenues of reasoning. First, petitioner may argue that while the ultimate burden of persuasion remains with him, once a prima facie case is established, an employer must present the reasons for the employment decision by "clear and convincing evidence." Secondly, petitioner's argument may be construed to the effect that, once a prima facie case is established, an employer now carries the ultimate burden of persuasion and must overcome this burden using "clear and convincing evidence." Either argument is conceptually flawed and inopposite with the Court's latest pronouncements; the language and rationale of *Texas Dept. of Community Affairs v. Burdine, supra,* resolves each.

The *Burdine* Court reviewed the following question: "whether, after the plaintiff has proved a prima facie case of discriminatory treatment, the burden shifts to the defendant to persuade the court by a preponderance of

evidence that legitimate, non-discriminatory reasons for the challenged employment action exist." *Id.*, at 250, 101 S.Ct., at 1092. This question, bearing the same characteristics as that asserted by petitioner, was answered in the negative. The Court specifically rejected such an evidentiary criteria and, when doing so, re-affirmed what it had already thought clear. In describing the nature of the burden placed on a defendant-employer, the Court stated:

> The burden that shifts to the defendant . . . is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. See *Sweeney, supra*, at 25, 99 S.Ct., at 296. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. . . . Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.

Burdine, 450 U.S., at 255-56, 101 S.Ct., at 1094-95.

Addressing what respondents perceive to be the first avenue petitioner's argument may take, *Burdine* rejects the need for a "clear and convincing" standard. The primary purpose of placing the burden of production upon

an employer is to help define disputed factual issues. "[T]he allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.*, at 255, n. 8, 101 S.Ct., at 1094-95. "If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity." *Id.*, at 255, 101 S.Ct., at 1095. An employer's burden of production focuses the attention of the trier of fact on those specific instances that allegedly prompted the adverse employment decision. This requirement seems only natural, for without it, a plaintiff would be required to address in his or her case in chief each and every aspect of employment in an attempt to rule out any possible legitimate, non-discriminatory reason for the employer's actions. Such a requirement would be immense, if not insurmountable. Instead, the burden of production placed on the defendant simply frames the remaining portions of the lawsuit. A "clear and convincing" standard is not needed to accomplish this goal. *Burdine* makes clear that "the employer's burden is satisfied if he simply explains what he has done or produces evidence of legitimate nondiscriminatory reasons." *Id.*, at 256, 101 S.Ct., at 1095 (quoting *Sweeney*, 439 U.S., at 25, n. 2, 99 S.Ct., at 296.). Moreover, *Burdine* rejected the Fifth Circuit's former scheme which "placed on the defendant the burden of persuading the court that it had *convincing, objective reasons* for preferring the chosen applicant above the plaintiff," *id.*, at 257, 101 S.Ct., at 1095 (emphasis added), reasoning:

> We have stated consistently that the employee's prima facie case of discrimination will be rebutted if the

> employer articulates lawful reasons for the action; that is, to satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus.

Id., at 257, 101 S.Ct., at 1096.

When further defending this policy, the Court noted that "defendant's explanation of its legitimate reasons must be clear and reasonably specific." *Id.*

With the case *sub judice*, it is uncontroverted that respondents' proffered reasons were "clear and reasonably specific." Petitioner was knowledgeable of each reason for his discharge and had full opportunity to challenge these reasons. Instead, and throughout his appeal, it has been argued that these specific reasons were mere pretextual to the underlying charge of discrimination. Such findings are factual in nature, necessarily entailing questions of intent and credibility, and are insulated from appellate review unless they are clearly erroneous. *Pullman-Standard v. Swint*, 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed. 2d 66 (1982). The factual support for respondents' employment decision was of a detailed nature; the District Court went so far as to say: "the reasons proffered by the school board . . . are supported by substantial evidence." Appendix B-19. The Circuit Court of Appeals, after adequate briefing, affirmed. Petitioner has received a full and complete opportunity to present his argument that the proffered reasons were pretextual. He cannot make such a showing.

Petitioner's second avenue implicates the possibility of shifting the burden of persuasion to the employer once a plaintiff has established a prima facie case. Again, *Bur-*

dine directs otherwise. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Dept. of Community Affairs v. Burdine,* 450 U.S., at 253, 101 S.Ct., at 1093; *id.,* at 256, 101 S.Ct., at 1095; see also, *Sweeney,* 439 U.S., at 25, n. 2, 99 S.Ct., at 296; *Ford Motor Co. v. E.E.O.C.,* 458 U.S. 219, 224, n. 7, 102 S.Ct. 3057, 3061, 73 L.Ed. 2d 721 (1982) ("As *Burdine* commands, the District Court did not place the burden of persuasion on [the employer]."). The reasons petitioner might offer to support this argument have already been considered by this Court on at least two recent occasions. Petitioner fears that absent a more stringent burden an employer "may compose fictitious, but legitimate, reasons for his actions." See *Turner v. Texas Instruments, Inc.,* 555 F.2d 1251, 1255 (5th Cir. 1977). Petitioner states: "[t]he problem of showing discrimination in a case such as this . . . is far more difficult than in the usual case of comparing a worker [sic] treatment with a non-minority worker who is employed at the same time under the same conditions. . . . [and] ought to raise a far stronger presumption of unlawful discrimination than the usual case, simply because of the extreme difficulty of a plaintiff with a meritorious case being able to prove his case on the merits." Petition, pp. 27-28. When the *Burdine* Court rejected arguments to increase the employer's obligation beyond that of a burden of production, it stated:

> We do not believe . . . that limiting the defendant's evidentiary obligation to a burden of production will unduly hinder the plaintiff. First, as noted above, the defendant's explanation of its legitimate reasons must be clear and reasonably specific. . . . Second, although the defendant does not bear a formal burden of per-

> suasion, the defendant nevertheless retains an incentive to persuade the trier of fact that the employment decision was lawful. Thus, the defendant normally will attempt to prove the factual basis for its explanation. Third, the liberal discovery rules applicable to any civil suit in federal court are supplemented in a Title VII suit by the plaintiff's access to the Equal Employment Opportunity Commission's investigatory files concerning her complaint. . . . Given these factors, we are unpersuaded that the plaintiff will find it particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext. We remain confident that the *McDonnell Douglas* framework permits the plaintiff meriting relief to demonstrate intentional discrimination.

Burdine, 450 U.S., at 258, 101 S.Ct., at 1096 (citations omitted).

More recently, the Court addressed petitioner's complaints concerning the difficulty of proving intentional discrimination in the case of *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed. 2d 403 (1983). There the Court noted:

> All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. . . . There will seldom be "eyewitness" testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern "basic allocation of burdens and order of presentation of proof," *Burdine*, 450 U.S., at 252, 101 S.Ct., at 1093, in deciding the ultimate question. The law often obliges finders of fact to inquire into a person's state of mind.

Aikens, 460 U.S., at 716, 103 S.Ct., at 1482.

Since the Court has recently rejected arguments consistent with those of the petitioner, certiorari should be denied on this basis.

CONCLUSION

Petitioner has presented no compelling reason why certiorari should be granted and failed to raise the issue at either the trial or the circuit level. Petitioner's current argument is adequately managed through the flexible *McDonnell Douglas* framework. "The method suggested in *McDonnell Douglas* for pursuing this inquiry, however, was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Construction Corporation v. Waters,* 438 U.S., at 577-578, 98 S.Ct., at 2949-2950. The central focus of the inquiry in a case such as this is always whether the employer is treating some people less favorably than others because of their race, color, religion, sex or national origin. *Teamsters v. United States,* 431 U.S. 324, 336, 97 S.Ct. 1843, 1854, 52 L.Ed.2d 396 (1977).

The proper approach to addressing petitioner's argument, as outlined by this Court's decisions, is to construe the alleged changes in the required work performance as giving rise to an inference of discrimination. The fact that a non-minority may have been retained in past years goes to the persuasive weight given the inference by the trier of fact. The burden placed upon the defendant should not change from a burden of production; and a plaintiff should be required to carry the ultimate burden of per-

suasion. This is the methodology adopted by both the District Court and the Court of Appeals. Respondent's rebuttal testimony, described by the District Court as "substantial," obviously outweighed petitioner's evidence at trial. Such a finding is factual in nature and should not be disturbed. As the Court of Appeals stated: "Although the comparison between treatment accorded Work [the non-minority counter-part] and that accorded [petitioner] might support an inference of discrimination, it is insufficient to undermine the thorough findings of fact marshalled to support the district court's decision." Appendix C-9.

Accordingly, respondents respectfully request that petitioner's writ of certiorari be denied.

Respectfully submitted,

OXFORD MUNICIPAL SCHOOL DISTRICT and its Board of Trustees in their individual and official capacities, GENE MEADOWS and TERRY MOOD, in their individual and official capacity.

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APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 85-4600

SAMUEL P. TORRENCE, JR.
PLAINTIFF-APPELLANT

versus

OXFORD MUNICIPAL SCHOOL DISTRICT and its BOARD OF TRUSTEES, in their individual and official capacities, GENE MEADOWS and TERRY MOOD, in their individual and official capacity

DEFENDANTS-APPELLEES

BRIEF OF PLAINTIFF-APPELLANT

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

COUNSEL:

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ISSUES

1. Whether the District Court erred in finding that the appellant, Samuel P. Torrence, Jr., was discharged from his employment with the Oxford Municipal School District because of his race. This issue encompasses three sub-issues:

a. Whether the school administration deliberately engaged in a long-term plan to put Mr. Torrence into a position where he could not possibly measure up to the standard required of him by the administration;

b. Whether Mr. Torrence was treated differently from other band directors and employees who achieved similar results, but were allowed to retain their employment;

c. Whether the school dministration adequately supported Mr. Torrence after it voted to retain him based upon the recommendations of a hearing officer in 1980 which recommendations included such items as an assistant band director, new uniforms, etc.

* * *

* * *

ARGUMENT

THE FIRING OF THE APPELLANT, SAMUEL TORRENCE, WAS RACIALLY MOTIVATED AND FALLS WITHIN THE PROHIBITION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

The case law involving Title VII Discrimination suits is well established. Under *McDonnell Douglas Corporation v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973) the United States Supreme Court held that under the statute the complainant must carry the initial burden of establishing a prima facie case of racial discrimination. The burden then shifts to the employer to articulate some legitimate, non-discriminatory reason for the employee's rejection. 411 U.S. at 802. Should the defendant carry this burden, then the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not the true reasons, but were a pretext for discrimination. Ibid at 411 U.S. 804.

The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times, however, with the plaintiff. The *McDonnel Douglas* division of intermediate evidentiary burdens serves to bring the . . .

* * *